

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF SONGEA**

AT SONGEA

PC CIVIL APPEAL NO. 11 OF 2023

SEMENI PETER NJELEKELI APPELLANT

VERSUS

AUGUSTINO BRUNO HONDE RESPONDENT

**(Appeal from the decision of the District Court of Namtumbo at
Namtumbo in Matrimonial Appeal No. 1 of 2023)**

JUDGMENT

28th August & 22nd September, 2023

KISANYA, J.:

This is an appeal by Semeni Peter Njelekela (appellant) against Augustino Bruno Honde (respondent). It arises from a matrimonial dispute which ended into a decree of divorce before Namtumbo Primary Court (the trial court). In addition, the appellant was given 55% shares of the matrimonial house located at Namtumbo, a plot of land and housewares and 45% shares of other matrimonial house, plot of land and a garden. Further to this, two issues of marriage aged 2 years and 11 years were placed under the custody of the appellant and the respondent, respectively.

Aggrieved, the appellant unsuccessfully appealed to the District Court of Namtumbo (first appellate court). Feeling that justice was not served by the two courts below, the appellant filed a petition of appeal in which she raised four grounds of appeal. However, for reasons that will be apparent shortly, I need not to reproduce them.

At the hearing of the appeal, the appellant had the services of Mr. Lazaro Simba, learned advocate, whereas the respondent appeared in person, legally unrepresented. Parties were also asked to address this Court on whether the certificate from the Marriage Conciliation Board (hereinafter referred to as “the Board’s certificate”) was tendered before the trial court; and if the answer to that issue is not in the affirmative, what is the remedy thereof.

Considering that the issue raised by the Court goes to the root of the case in respect of the legality or propriety or otherwise of the proceedings before the trial court and the first appellate court, I will determine it first.

Responding to the foresaid issue, Mr. Simba submitted that the record is silent on whether the Board’s certificate was tendered in

evidence. On that account, he was of the view that section 101 of the Law of Marriage Act [Cap. 29, R.E. 2019], (the LMA) was not complied with. It was his further submission that oral evidence on the Board's certificate was not given as mandatorily required under rule 8 of GN No. 179 of 1964. That being the case, the learned counsel submitted that there was no evidence to prove that the Marriage Conciliation Board (the Board) had failed to reconcile the parties. He was of the firm view that the proceedings of both lower courts are a nullity. That said, Mr. Simba invited this Court to nullify the proceedings of the lower courts and the judgments made therefrom.

On his part, the respondent contended the Board's certificate was handed over to the appellant. However, he admitted that the said certificate was not tendered in evidence. Being a lay person, he stated that he was not aware of the consequence of omission to tender the certificate.

Having heard the submissions of the parties, I wish to state, at the outset that, in terms of the record, the trial court granted the divorce on the ground of wilful neglect on the part of the respondent under section 107(2)(d) of the LMA. The law is settled that, grant of divorce is subject to compliance with section 101 of the Act. According to the said provision, a petition for divorce cannot be instituted unless a matrimonial matter has

been referred to the Board. Furthermore, the Board must have certified that it has failed to reconcile the parties by issuing a certificate to such effect. As the provision of section 101 is couched in mandatory terms, it must be complied with, unless it is proved that the matter falls under exception set out under section 101(f) of the LMA.

It is common ground that the Board's certificate was not tendered in evidence during trial. Further to this, there is nothing to indicate that the said Board's certificate was appended to the complaint (pleadings) instituted before the trial court as required under section 106 (2) of the LMA. Yet, there is no proof or indication of extra-ordinary circumstances for dispensation with reference of the matter to the Board. In view of the above cited provisions, the trial court ought to have satisfied itself of the existence of the Board's certificate. The record bears it out that, this was not done.

Even if it assumed that the Board's certificate was appended to the complaint filed at the trial court, it is settled law in this jurisdiction that documents appended to the pleadings is not part of evidence. See for instance, the cases of **Shemsa Khalfa and Others vs. Suleiman Hamed Abdalla**, Civil Appeal No. 82 of 2012, (unreported), **Crescent Impex (T) Limited vs Mtibwa Sugar Estates Limited**, Civil Appeal

No. 455 of 2020, [2023] TZCA 17501 (16 August 2023) and **Patrick William Magubo vs Lillian Peter Kitali** (Civil Appeal No. 41 of 2019) [2022] TZCA (18 July 2022) to mention but a few. In that regard, the appellant was bound to tender the Board's certificate in evidence.

The requirement to produce document and give evidence on the same is also provided for under regulation 8(1)(b) and 11(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1964 which was discussed in the case of **George Mbushi vs Mniko Magesa**, PC Civil Appeal No. 62 of 2019, HCT at Musoma (unreported) as follows:

"Further, regulation 8(1) (b) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1964 provides that facts can be proved by evidence which may be, the production of documents by witnesses (documentary evidence). In case where documentary evidence is produced, it can be relied upon if oral evidence to link it with the case is given. This is pursuant to regulation 11(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1964 which provides that:

"Where documentary evidence is produced, oral evidence must be given to connect it with the case."

In the case at hand, apart from failing to produce the Board's certificate, neither the appellant nor the respondent gave an oral testimony on whether the matrimonial dispute was referred to the Board and whether the said Board issued a certificate to the effect that it had failed to reconcile the parties.

All the above considered, I hold the view that the trial court did not satisfy itself on the existence of the Board's certificate confirming that it had failed to mediate or reconcile the appellant and the respondent. It is settled position that, the matrimonial proceedings conducted without the certificate of the board is a nullity. I am bolstered by the case of **Abdallah Hamis Kiba vs Ashura Masatu** Civil Appeal No. 465 of 2020 (unreported) where the Court of Appeal held that:

"On that basis, we hold that the entire proceedings and the decisions of the courts below are a nullity as they stemmed from the illegal assumption of jurisdiction by the trial court despite the absence of a valid certificate. Needless to say, the trial court's decree of divorce is quashed for being a nullity."

Applying the above position to this case, I agree with Mr. Simba that, the proceedings and the decisions of the trial court and first appellate court are a nullity for want of the Board's certificate. Since the issue is

raised, *suo mottu*, by the Court is sufficient to dispose of this appeal, I am not going to determine the merits of this appeal.

For the foregoing reasons, I hereby strike out this appeal, quash and set aside the decisions and orders of the two courts below. Since none of the parties tendered the Board's certificate, I find it not appropriate to make an order for retrial. Either party is at liberty to institute a fresh petition in accordance with the law. I make no order as to costs because this is a matrimonial matter.

It is so ordered.

DATED at SONGEA this 22nd day of September, 2023.



S.E. KISANYA
JUDGE
22/09/2023